

10-23-1990

## Fourth Prize: People v. McAlpin

Wei E

Tara Mueller

**FOURTH PRIZE**

1S2010577

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Plaintiff and Respondent,	)
	)
v.	)
	)
BRUCE McALPIN,	)
	)
Defendant and Petitioner	)
	)
	)

**RESPONDENT'S BRIEF ON THE MERITS**

On Appeal From the Judgment of the Superior Court of the  
State of California, County of Santa Clara  
The Honorable John A. Flaherty, Judge  
and Jury

Review of the Decision of the Court of Appeal,  
Sixth District

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STATEMENT OF THE CASE

This is an appeal from a ruling, issued on May 2, 1989 by the Sixth District California Court of Appeal (App.Ct.No. H004154), affirming the jury's unanimous conviction on November 23, 1987 of appellant Mr. Bruce McAlpin (Santa Clara County Super.Ct.No. 116671), for committing lewd and lascivious acts on a nine-year old child in violation of California Penal Code section 288(a). This court granted review on August 29, 1989. Appellant challenges two evidentiary rulings of the trial court. First, he contends that the trial court committed reversible error by admitting the expert testimony of a Los Gatos police officer, who testified that: (1) it is not uncommon for parents to delay reporting an act of child molest to the authorities; and (2) there is no "profile" or stereotype of a child molester. Second, appellant contends that the trial court committed reversible

error by excluding the testimony of appellant's character witnesses that he was not a sexual deviant, and by restricting their testimony to opinion and reputation evidence regarding his character for honesty and veracity.

#### **STATEMENT OF FACTS**

Defendant Bruce McAlpin met Anita Manley, the mother of the complaining witness, at a dance in Santa Clara, California in April or May of 1985. (R.T. 152.) Ms. Manley has three children, Stephanie (then age 9), Valerie (then age 7), and Isaac (then age 1). On or about June 8, 1985, the defendant and Ms. Manley went out to dinner and dancing in Fremont. That evening, the defendant spent the night in his van in the driveway of Ms. Manley's mother's house, also in Fremont. (R.T. 153.) The next day, Ms. Manley, her three children, and the defendant spent the morning at this house. Early that afternoon, they went to Toys-R-Us to purchase a toy for Stephanie, who was celebrating her birthday that day. Afterward, the defendant, Ms. Manley, and her three children went to the defendant's house in San Jose. (R.T. 156.) The group then proceeded to watch television in the defendant's bedroom on the defendant's bed. Valerie laid on defendant's left side, Stephanie laid on his right side, and Ms. Manley sat at the foot of the bed with Isaac. (R.T. 158-159.) After an unconfirmed amount of time, Ms. Manley and Isaac left the room.

Stephanie testified that the defendant initially began touching her while her mother was still in the room. (R.T. 202.) According to Stephanie, at first he only touched her on the arm, but soon thereafter, he started moving his hand around the cuff of her shorts and along the elastic of her underwear. (R.T. 202.) Stephanie stated that whenever her mother would look in defendant's direction, he would

stop touching her. (R.T. 203.) Stephanie testified that the defendant continued to touch her after her mother left the room. (R.T. 207.) She also testified that at some point the defendant put his finger in her vagina, although she could not remember whether this was when her mother was in or out of the room. (R.T. 204.) She stated that a few minutes after her mother left, she told the defendant that she had to go to the bathroom and went outside to see her mother. (R.T. 206.)

Defendant, on the other hand, denied that any lewd touching or penetration of Stephanie's vagina had occurred. (R.T. 333.) He testified that in fact, Stephanie had moved her hand toward his genitals after Ms. Manley had left the room. (R.T. 333.) Defendant claimed that he grabbed Stephanie's arm and told her not to touch him there, and that Stephanie then got up and left the room without saying anything. (R.T. 334.)

Ms. Manley testified that approximately ten minutes after she had left the room, Stephanie emerged from the house in a "little bit of a hurry" and looked at her with an expression that she had never seen before. (R.T. 159.) She indicated that Stephanie looked sick and had tears in her eyes. (R.T. 159.) Ms. Manley testified that she questioned Stephanie as to what was wrong and Stephanie responded that the defendant had put his hand in her "private." (R.T. 160.) Ms. Manley then went inside to confront the defendant about this. (R.T. 160.) She testified that she asked the defendant what was going on, and that he denied anything had occurred. (R.T. 161.) According to Ms. Manley, the defendant changed the subject by suggesting that they all go out for pizza. Ms. Manley testified that she agreed to go because she did not know what else to do at this point. (R.T. 161.)



Ms. Manley did not report the incident to the police. (R.T. 164.)

Defendant, on the other hand, testified that after Ms. Manley confronted him with the alleged assault, he explained to her that Stephanie had touched his genitals. (R.T. 317.) The defendant then testified that he and Ms. Manley took Stephanie aside and told her not to let this happen again. (R.T. 318.) According to the defendant, it was not until after this conversation that he recommended they go out to eat. (R.T. 335.)

Ms. Manley testified that she only dated and had sexual relations with the defendant once after the alleged molestation. (R.T. 180.) Defendant, on the other hand, testified that he and Ms. Manley in fact dated twice after the alleged incident. (R.T. 335.)

Stephanie reported the alleged incident of child molest approximately one year later to representatives from the Children's Awareness Program, who had given a presentation about child abuse at her school. (R.T. 208.) The Children's Awareness Program representatives then reported the incident to the authorities. The authorities did not investigate the matter until approximately one year after it was reported. (R.T. 210.) Bruce McAlpin was indicted as a result of this investigation.

At the trial, the prosecution introduced the testimony of Jeffrey Miller, an officer from the Los Gatos Police Department trained in juvenile law enforcement. Officer Miller testified that: (1) it is not uncommon for a parent to delay reporting an alleged incident of molestation perpetrated by someone the parent has been dating; and (2) there is no "profile" or stereotype of a typical child molester, and in fact child molesters are often people the child knows and trusts. (R.T. 261-64.) Defense counsel objected to the admission of this

evidence on the grounds that: (1) Officer Miller was not qualified to testify as an expert pursuant to California Evidence Code section 801; (2) the evidence had no probative value; and (3) even if his testimony possessed some probative value, its probative value was outweighed by its prejudicial effect under California Evidence Code section 352. (R.T. 268.) The trial court overruled these objections and admitted the testimony on the grounds that: (1) the voir dire examination demonstrated that Officer Miller possessed ample qualifications to testify as an expert under Evidence Code section 801; (2) the testimony was relevant; and (3) the probative value of the testimony in light of the facts of the case outweighed any prejudicial effect the evidence might have on the defendant. (R.T. 268-69.)

During voir dire examination, defense counsel offered the testimony of two of the defendant's former girlfriends, who would have testified that, based on their past sexual experiences with the defendant and the fact that they had not observed the defendant molesting their daughters: (1) the defendant was not a sexual deviant; and (2) the defendant was a person of high moral character. (R.T. 289.) The court declined to admit this evidence on the basis that: (1) these lay witnesses were not qualified to give their opinions on a subject which called for expert testimony; (2) the offered testimony related to specific instances of conduct, which, pursuant to California Evidence Code sections 1101 and 1102, may not be offered to prove a trait of the defendant's character and that he acted in conformance with this character trait on a specified occasion; and (3) the minimal probative value of the testimony was outweighed by its prejudicial effect pursuant to California Evidence Code section 352. (R.T. 290-94.)

### QUESTIONS PRESENTED

1. Whether, in a trial for lewd and lascivious acts upon a nine-year old child, the trial court properly admitted a police officer's testimony offered by the prosecution as expert opinion evidence, that: (a) a parent's delay in reporting his or her child's statement to the police that the child has been molested by someone the parent has been dating is not uncommon; and (b) there is no child molester "profile," or stereotype.
2. Whether, in a trial for lewd and lascivious acts upon a nine-year old child, the trial court: (a) properly excluded the testimony of the defendant's previous girlfriends that his sexual behavior was not deviant; and (b) properly restricted the witnesses' testimony to opinion and reputation evidence regarding the defendant's character for honesty and veracity.
3. Whether, assuming the trial court erred in admitting and/or excluding testimony, the error is reversible per se, or resulted in a miscarriage of justice under People v. Watson, 46 Cal. 2d 818 (1956).

### SUMMARY OF ARGUMENT

The trial court properly admitted the police officer's testimony that it is not uncommon for parents of victims of child molestation to delay reporting the incident to the police, and that there is no child molester stereotype, for three reasons.

First, Officer Miller was qualified to testify as an expert witness pursuant to California Evidence Code section 801. Under section 801, opinion testimony of expert witnesses is limited to those subjects that are sufficiently beyond common experience such that the expert's opinion would assist the trier of fact. The opinion also must be based on matter perceived or personally known to the witness



of a type reasonably relied on by an expert in forming an opinion on the subject his testimony relates to. Cal. Evid. Code § 801 (West 1965). Here, the witness clearly met both prongs of this test. First, the subject matter of Officer Miller's testimony was whether or not it was common for a parent to delay reporting an incident of child molestation to the police, and whether or not there is a stereotype for a child molester. These matters are not within the common experience of the average juror. Officer Miller's expert opinion was therefore essential to assist the jury in evaluating Ms. Manley's (and therefore Stephanie's) credibility, and to assist them in evaluating the defendant's testimony free from common misconceptions regarding child molesters. Next, the voir dire indicated that Officer Miller's expert opinion was based on hundreds of hours of his personal training and experience, as well as on generally-accepted articles, books, and case studies and conversations with other experts. As such, his testimony was based on matter that is reasonably relied on by an expert when formulating an opinion.

Second, Officer Miller's testimony was properly admitted because it was highly relevant to the case. Expert testimony is relevant and admissible when offered to rehabilitate or to support the credibility of the complaining witness, and to disabuse the jury of widely held misconceptions. People v. Bledsoe, 36 Cal. 3d 236, 247-48 (1984); People v. Roscoe, 168 Cal. App. 3d 1093, 1098 (1985). Officer Miller's expert testimony was relevant because it was offered to rehabilitate and support Ms. Manley's credibility, which in turn supported Stephanie's credibility. It also permitted the jury to evaluate the credibility of the defendant's testimony divorced from popular myths regarding "typical" characteristics of child molesters.

Third, the trial court properly admitted Officer Miller's testimony on the basis that the probative value of his expert testimony in light of the facts of the case substantially outweighed its prejudicial effect pursuant to California Evidence Code section 352. The court's duty under this section is to balance the probative value of the offered evidence against its potential of unfair prejudice, undue time consumption, and creation of jury confusion. As discussed above, Officer Miller's testimony was highly probative on the disputed facts of the witnesses' credibility. On the other hand, the danger of unfair prejudice to the defendant was minimal in comparison with the high probative value of the testimony. Officer Miller testified as to matters regarding child molestation cases in general, and did not discuss the specific facts of the case. His testimony also was not unduly time-consuming or confusing.

The trial court also properly excluded the testimony of defendant's former girlfriends regarding his past "normal sexual behavior," and properly restricted their testimony to opinion and reputation evidence regarding his character for honesty and veracity.

First, the trial court correctly concluded that lay persons are not qualified to testify regarding the normalcy of an individual's sexual behavior, because such testimony is within the realm of expert testimony. People v. Spigno, 156 Cal. App. 2d 279, 289 (1957). A witness may testify in this area only if he has the knowledge, skill, experience, training, or education sufficient to qualify him as an **expert** on the subject of what is normal or deviant human sexual behavior. See, Cal. Evid. Code § 720 (West 1965). Here, the defendant made no offer of proof of the expert qualifications of his former girlfriends, and therefore their testimony as to the

defendant's prior "normal sexual behavior" was properly excluded.

Second, the character witnesses' testimony regarding the defendant's past sexual behavior was also properly excluded on the basis that this testimony related to specific instances of conduct. California Evidence Code sections 1101 and 1102 clearly state that evidence of a defendant's character or trait of his character in the form of specific instances of conduct is not admissible if offered to prove the defendant's conduct on a specified occasion. Since the defendant was offering the evidence of his past acts as proof that he did not commit the alleged molestation, the evidence was plainly inadmissible under these sections.

In addition, even if the specific acts testimony was being offered in support of the defendant's credibility, which is permissible, it was properly excluded on the basis that this testimony was irrelevant to the issue of the defendant's credibility. Evidence of a person's past sexual behavior is collateral to the issue whether he or she is a truthful person. The trial court also properly restricted the character witnesses' testimony to the specific character traits of honesty and veracity on this basis. The defendant's character for honesty and veracity was the only character trait relevant to his credibility, the only disputed fact of the case. Evidence regarding other character traits was therefore irrelevant and inadmissible.

Furthermore, even assuming this evidence possessed some minor probative value, its probative value was substantially outweighed by the prejudicial effect of the evidence on the prosecution pursuant to California Evidence Code section 352. Admitting evidence of the defendant's relationships with former girlfriends would not only have

been very time-consuming, it also would have had the potential to confuse and distract the jury from the facts at issue in the case. Therefore, the trial court did not abuse its discretion in excluding the character witnesses' specific acts testimony, and in limiting their testimony to opinion and reputation evidence.

Finally, assuming the trial court erred in the admission and/or exclusion of evidence, the errors are not reversible per se, nor did they result in a miscarriage of justice under People v. Watson, 46 Cal. 2d 818 (1956). The errors are not reversible per se because they did not deny the defendant his right to a fair trial. He was still permitted to be tried before a jury and an impartial judge, to present evidence in support of his defense, and to cross-examine the prosecution's witnesses. The errors also did not result in a miscarriage of justice requiring reversal. It is not reasonably probable that a more favorable result would have been reached even if the prosecution's expert testimony were excluded, and the defendant's proffered character evidence were admitted, because there was other evidence in support of the jury's verdict. Therefore, this court should not disturb the jury's verdict assuming the trial court did err in the admission and/or exclusion of evidence.

#### **ARGUMENT**

- I. THE TRIAL COURT DID NOT ERR IN ADMITTING OFFICER MILLER'S EXPERT TESTIMONY BECAUSE THE TESTIMONY SATISFIED THE REQUIREMENTS OF EVIDENCE CODE SECTION 801, IT WAS RELEVANT, AND ITS PROBATIVE VALUE OUTWEIGHED ITS POTENTIAL PREJUDICIAL EFFECT.

Officer Miller was qualified to testify as an expert witness on the subject of child molestation pursuant to Evidence Code section 801. Officer Miller's testimony was also admissible because it was highly relevant to support and rehabilitate Ms. Manley's credibility.



Her testimony in turn was relevant to support the complaining witness' credibility. The testimony was also relevant to assist the trier of fact in evaluating the credibility of the defendant's testimony free from the constraints of common misconceptions regarding child molesters. Finally, the trial court properly weighed the probative value of the officer's testimony against its potential for unfair prejudice pursuant to California Evidence Code section 352, and determined that the probative value of the evidence substantially outweighed its potential prejudicial effect.

A. Officer Miller's Expert Testimony Was Admissible Because The Subject Of Child Molestation Is Beyond The Common Experience Of The Jury And The Testimony Would Assist The Jury.

Officer Miller's testimony was admissible because it satisfied the first prong of the test for admissibility of expert opinion testimony under Evidence Code section 801. Section 801(a) provides that an expert testimony in the form of an opinion is admissible if the subject is "sufficiently beyond common experience" that the opinion of an expert would assist the trier of the fact. Cal. Evid. Code § 801(a) (West 1965). This court has recently held that an expert's opinion should be excluded under this section "only when it would add **nothing at all** to the jury's common fund of information." People v. Stoll, 49 Cal. 3d 1136, 1154 (1989) (Emphasis in original).

Several California courts have held that testimony on the issue of child molestation is sufficiently beyond common experience to be admissible as expert testimony. People v. Stark, 213 Cal. App. 3d 107, 110 (1989); People v. Dunnahoo, 152 Cal. App. 3d 575, 577 (1984). In People v. Stark, the court held that a psychologist's expert testimony regarding "child abuse accommodation syndrome" was properly admitted and relevant to explain why victims of sexual assault often

delay in reporting incidents of abuse. Stark, 213 Cal. App. 3d at 110. Similarly, in People v. Dunnahoo, two police officers were permitted to testify as expert witnesses that, based on their training and experience, sexually molested children usually find it very difficult to talk about their sexual experiences with an adult. Dunnahoo, 152 Cal. App. 3d at 577. The court stated that the officers' testimony was admissible as expert opinion testimony because child molestation is a subject sufficiently beyond common experience that the opinion of an expert would assist the jury. Id.

The present case is analogous to Stark and Dunnahoo. As in those cases, Officer Miller was called by the prosecution to give expert opinion testimony, based on his training and experience, on the subject of child molestation. In Stark and Dunnahoo, the officers testified that it is not unusual for the victims of child molestation to delay reporting an incident of child molest and to be reluctant to talk about their sexual experiences. Similarly, Officer Miller testified that it is not unusual for parents of victims of child molestation to delay reporting the incident to the police. The sensitivities of victims and the sensitivities of their parents are closely connected: a sexually molested child finds it difficult to talk about the molestation with an adult, just as a parent of such a child finds it difficult to talk about the molestation with the authorities. Officer Miller testified that there are a number of reasons why parents might delay reporting an incident of child molest, such as feeling shameful, fear of the relationship breaking up, or fear of causing a family conflict. Such knowledge is beyond the common experience of the average juror. Because of this, Officer Miller's expert opinion was essential to assist the jury in evaluating

the credibility of Ms. Manley's testimony, which in turn was crucial to assist them in evaluating the credibility of Stephanie's testimony. Officer Miller's testimony therefore satisfied the requirements of Evidence Code section 801(a).

Officer Miller's testimony that there is no stereotype for a child molester was also admissible under Evidence Code section 801(a). This evidence was offered to dispel common misconceptions the average juror may hold regarding "typical" characteristics of child molesters. His testimony therefore by definition was related to a subject beyond common experience.

Officer Miller's testimony is analogous to that offered in People v. Bledsoe, 36 Cal. 3d 235 (1984). In Bledsoe, a rape counselor was called by the prosecution to testify as an expert witness that, in her opinion, the victim was suffering from "rape trauma syndrome." Id. at 243-44. The court held that her expert testimony was admissible to disabuse the jury of widely held misconceptions about rape and rape victims, so that the jury could evaluate the evidence "free of the constraints of popular myths." Id. Similarly, in People v. Bowker, 203 Cal. App. 3d 385 (1988), the court held that an expert psychologist's testimony was admissible to dispel common misconceptions of the jury regarding sexually abused children's reaction to the abuse, provided that the expert testimony was narrowly tailored to the purpose it was admissible for, and the prosecution identified the myth or misconception the testimony was designed to rebut. Bowker, 203 Cal. App. 3d at 394.

Just as there are common misconceptions about victims of rape and child abuse, there are also misconceptions about the perpetrators of such crimes. Officer Miller testified during the voir dire

examination that most people think of child molesters as strangers who use physical force. However, he testified that, contrary to this common belief, statistics show that only ten and one half percent of all molestations are actually perpetrated by strangers, and that most child molesters do not use physical force, but rather use seduction methods. Officer Miller's testimony was narrowly tailored to disabuse the jury of these common misconceptions, thus enabling them to evaluate the defendant's testimony free from such illusions. The prosecution also indicated that the officer's testimony was offered for this purpose. Therefore, because his testimony was beyond the jury's common experience and was of assistance to the jury, it satisfied the requirements for admissibility under Evidence Code section 801(a).

B. Officer Miller's Testimony Was Admissible Because It Was Based On Matter Upon Which Experts May Reasonably Rely.

Officer Miller's testimony was admissible because it also satisfied the second prong of the test for admissibility of expert opinion testimony pursuant to Evidence Code section 801. Section 801(b) provides that opinion testimony of an expert witness must be:

based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness...that is of type that reasonably may be relied on by an expert in forming an opinion on the subject to which his testimony relates...

Cal. Evid. Code § 801(b) (West 1965).

Officer Miller's testimony that it is not unusual for parents to delay reporting an incident of child molest and that there is no child molester stereotype was based on his extensive personal knowledge, experience, and training, on his study of generally-accepted books, articles, and case studies, and on his conversations with other



experts. The lengthy voir dire revealed that Officer Miller had four years of experience as an investigative officer for the Juvenile Services Bureau of the Los Gatos Police Department. During this time, he had between 350 and 400 hours of specialized training dealing with juveniles, juvenile law, and child abuse. He had also taken a forty-hour juvenile law enforcement training course, and had personally handled over 100 child abuse cases. Officer Miller also had previously been qualified as an expert in California Superior Court on the subject of sexual and physical abuse. Finally, Officer Miller had studied numerous books, articles, and case studies that were accepted and used by other experts involved in the field of child molestation, and regularly consulted with other experts in the field. These facts amply demonstrate that Officer Miller's testimony was based on matter perceived or personally known to him of a type on which experts may reasonably rely. Furthermore, the sufficiency of the showing of a witness' qualifications to testify as an expert is a matter within the sound discretion of the trial court. A trial court's ruling must not be disturbed unless manifest abuse of discretion is shown. People v. Kelly, 17 Cal. 3d 24, 39 (1976). As demonstrated by Officer Miller's substantial qualifications as an expert, no abuse of discretion was shown here.

C. Officer Miller's Testimony Was Admissible Because It Was Relevant And Its Probative Value Outweighed Its Potential Prejudicial Effect.

Officer Miller's testimony was also properly admitted because it was highly relevant to the case. "Relevant evidence" is defined by California Evidence Code section 210 as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is

of consequence to the determination of the action." Cal. Evid. Code § 210 (West 1965). All relevant evidence is admissible. Cal. Evid. Code § 351 (West 1965). Evidence is relevant when it logically or naturally tends to prove any disputed material fact; the evidence need not prove the fact conclusively. People v. Yu, 143 Cal. App. 3d 358, 376 (1983); People v. Cordova, 97 Cal. App. 3d 665, 669 (1979). The relative strength or weakness of the evidence is to be determined by the jury. Cordova, 97 Cal. App. 3d at 669. As with the admission of expert testimony, wide discretion is left to the trial court in determining whether evidence is relevant or not. People v. Hess, 104 Cal. App. 2d 642, 676 (1951). Expert testimony is relevant and admissible when offered to rehabilitate and to support the credibility of the complaining witness, and to disabuse the jury of widely held misconceptions. People v. Bledsoe, 36 Cal. 3d 236, 248 (1984); People v. Roscoe, 168 Cal. App. 3d 1093, 1099 (1985).

Officer Miller's expert testimony was relevant because it was offered for these permissible purposes and had a logical tendency to prove or disprove the disputed material facts of the witnesses' credibility. First, his testimony had a reasonable tendency to prove the credibility of Ms. Manley's testimony. Her testimony in turn had a reasonable tendency to prove Stephanie's credibility, which was the key disputed fact in the case. On cross-examination of Ms. Manley, the defendant attacked Ms. Manley's credibility, implying that because she did not report the incident to the police immediately, she did not believe that her daughter had been molested and thought her daughter was lying. Officer Miller's testimony that many parents delay reporting an incident of abuse was offered to rehabilitate and support Ms. Manley's credibility. Secondly, as discussed above, the evidence

was also relevant to dispel widely held misconceptions of the average juror regarding "typical" characteristics of child molesters. Officer Miller's testimony that there is no child molester stereotype was crucial for enabling the jury to evaluate the credibility of the defendant's testimony (the other key disputed fact in the case) free from the misconception that child molesters are only aggressive strangers.

The trial court does have the discretion to exclude an expert's testimony if:

its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Cal. Evid. Code § 352 (West 1965). However, if the trial court determines that the probative value of the evidence is not substantially outweighed by its potential prejudicial effect, this determination should not be overturned unless manifest abuse of discretion is shown. People v. Sassounian, 182 Cal. App. 3d 361, 402 (1986). In addition, the more substantial the probative value of the offered evidence, the greater must be the danger that an excluding factor will be present to support an exercise of the trial court's discretion excluding the evidence. Kessler v. Gray, 77 Cal. App. 3d 284, 291 (1978).

Here, the trial court made an explicit determination that the probative value of Officer Miller's testimony was not substantially outweighed by its prejudicial effect. This ruling was not an abuse of discretion. First, the probative value of Officer Miller's testimony was high, because it supported the credibility of the key witnesses in the case, and assisted the jury in understanding the subject of child

molestation, which is beyond the jury's common experience.

Furthermore, there are public policy considerations that weigh in favor of admitting this kind of evidence. Parents of molested children should be encouraged to report incidents of child molestation to the authorities to ensure that child molesters are prosecuted and to deter other would-be child molesters. If the courts permit the testimony of parents who do not immediately report an incident of abuse to be attacked in court without providing the prosecution an adequate means of rebuttal, parents will be discouraged from prosecuting child molestation cases. To avoid such an undesirable result, courts should be allowed to freely admit evidence which rehabilitates the credibility of the parents who do choose to testify.

Second, because Officer Miller's testimony was highly probative, it must have presented a similarly high danger of unfair prejudice in order for it to have been properly excluded by the trial court on the basis of a section 352 objection. However, the potential prejudicial effect of the testimony was slight here in comparison with its high probative value. Officer Miller did not investigate or have any knowledge of the specific facts of this case. His testimony made no reference to this case, but rather was based on the hundreds of other child abuse cases he had investigated, the numerous reports and articles he had studied, and on his discussions with other experts on the issue. Thus, cases holding that a significant danger of unfair prejudice exists when an expert discusses the specific facts of the case being tried do not apply here. People v. Bledsoe, 36 Cal. 3d 235, 251 (1984); People v. Roscoe, 168 Cal. App. 3d 1093, 1095 (1985). In Bledsoe, this court held that expert testimony is not admissible when offered to prove that the charged offenses had occurred.



Bledsoe, 36 Cal. 3d at 251. Similarly, in Roscoe, an appellate court held that it was error to admit a psychologist's expert testimony which in essence stated that the particular victim should be believed. Roscoe, 168 Cal. App. 3d at 1095. However, the Roscoe court also held that the danger of unfair prejudice was alleviated when the expert discussed victims as a class. Id. at 1100. Here, the expert testimony was not offered to prove that Ms. Manley should be believed, or that the defendant had actually molested Stephanie. Rather, the testimony was offered to rehabilitate and support Ms. Manley's credibility and to dispel common misconceptions regarding child molesters. In addition, the testimony merely referred to parents of victims of child molestation and child molesters as a class, and not to Ms. Manley or the defendant in particular. Finally, for similar reasons, there was little danger that Officer Miller's testimony would be unduly time consuming, would confuse the issues, or would mislead the jury. Therefore, the trial court did not abuse its discretion in admitting the officer's expert testimony pursuant to Evidence Code section 352.

II. THE TRIAL COURT PROPERLY EXCLUDED THE TESTIMONY OF THE DEFENDANT'S CHARACTER WITNESSES REGARDING THE DEFENDANT'S PAST SEXUAL CONDUCT AND PROPERLY RESTRICTED THEIR TESTIMONY TO OPINION AND REPUTATION EVIDENCE REGARDING HIS CHARACTER FOR HONESTY AND VERACITY.

The testimony of the defendant's lay character witnesses that the defendant was not a sexual deviant and did not exhibit lewd conduct on prior occasions was properly excluded because this testimony was within the realm of expert testimony. Furthermore, the character witnesses' testimony was properly restricted to opinion and reputation evidence regarding the defendant's character for honesty and veracity. The excluded testimony was offered as evidence of the defendant's

character in the form of specific instances conduct to prove that he did not commit the crime charged, which is prohibited under California Evidence Code sections 1101 and 1102. Finally, the proffered testimony was irrelevant to the material issue whether the defendant committed the crime charged, and even if slightly relevant, its probative value was substantially outweighed by its potential prejudicial effect.

A. The Trial Court Properly Excluded Lay Testimony As To The Defendant's Normal Sexual Behavior Because This Is A Subject Reserved Exclusively For Expert Testimony.

The proffered testimony of the defendant's ordinary character witnesses that, in their opinion, the defendant was a person who exhibited "normal sexual behavior" which was not lewd or deviant was properly excluded by the trial court, because lay persons are not qualified to testify on the subject of sexual deviance. It is well established that only an expert is qualified to testify in the area of sexual and other psychological disorders. See, e.g., People v. Davis, 62 Cal. 2d 791, 800-01 (1965) (a trained psychologist or medical expert is qualified to testify as to defendant's insanity); and People v. Jones, 42 Cal. 2d 219, 225 (1954) (exclusion of testimony of expert psychiatrist that defendant was not a sexual deviant was error). A witness may testify as an expert only if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Cal. Evid. Code § 720(a) (West 1965). An expert's opinion also must be based on matter perceived or personally known to him of a type that may reasonably be relied on by an expert in forming an opinion. Cal. Evid. Code § 801(b) (West 1965). This includes such items as medical treatises and records. Brown v. Colm, 11 Cal. 3d 639, 644 (1974).

The sufficiency of the showing of a witness' qualifications to testify as an expert is a matter resting largely within the discretion of the trial court, and its ruling must not be disturbed on appeal unless manifest abuse of discretion is shown. People v. Kelly, 17 Cal. 3d 24, 39 (1976).

The holding in People v. Spigno, 156 Cal. App. 2d 279 (1957), illustrates these principles. The defendant in Spigno was also charged with sexually molesting a nine-year old girl in violation of Penal Code section 288(a). The appellate court upheld the trial court's exclusion of testimony offered by defendant's witness, a lie detector technician and qualified psychologist, regarding the defendant's normal, non-deviant sexual behavior. Id. at 288-89. The court held that the exclusion of the defendant's evidence was proper because the competency of expert opinion in the field of sexual psychopathy is limited to persons who have medical and psychological training, and the defendant's counsel had failed to offer proof that the witness was qualified to give an expert opinion. Id.

In this case, as in Spigno, the defendant failed to make an offer of proof as to the character witnesses' qualifications to testify as experts. The defendant's witnesses were former girlfriends who would have based their opinions on their personal interactions with the defendant. Far from being persons with knowledge, skill, experience, training, or education sufficient to qualify them as experts on the subject of sexual deviance, the defendant's proffered witnesses were individuals with no special training or knowledge on this subject whatsoever. Further, their opinions were not based on matter that could reasonably be relied on by an expert witness, such as medical studies and medical data, but merely on their own personal

observations. Therefore, the trial court did not abuse its discretion in limiting their testimony to opinion and reputation evidence regarding the defendant's character for honesty and veracity, and as such the ruling may not be overturned.

The cases cited by the defendant are distinguishable from this case. In People v. Stoll, 49 Cal. 3d 1136 (1989), another case involving violation of Penal Code section 288(a), this court held that it was prejudicial error to exclude a psychologist's ~~expert~~ opinion that the defendants were not sexually deviant, because such evidence is relevant character evidence pursuant to California Evidence Code section 1102. Id. at 1152. The holding in Stoll is fully consistent with the trial court's ruling here, because the issue in that case was not whether the defense's witness was not qualified to testify as an expert; rather, the issue was whether the trial court properly excluded the evidence on the grounds that the proffered testimony violated special restrictions governing the admission of new or experimental scientific techniques. Thus, Stoll's holding is not contrary to the conclusion that, without an offer of proof of the witness' expert qualifications, lay opinion testimony regarding the defendant's sexual deviance is improper and inadmissible.

The other case cited by defendant is also distinguishable from this case. In People v. Deletto, 147 Cal. App. 3d 458 (1983), a case involving prosecution for an act of forcible oral copulation pursuant to Penal Code section 288a(c), the appellate court held that the trial court properly admitted the testimony of the victim's two foster mothers regarding their observations of the minor's previous aberrant sexual behavior, without an offer of proof of their expert qualifications. Id. at 479. However, in Deletto, the evidence was



offered not to show that the defendant committed the acts in question, but to rebut an inference that one of the foster mothers had fabricated the entire story. Deletto, 147 Cal. App. 3d at 479. In contrast, in this case, the defense's evidence was not offered to rebut an inference that Ms. Manley or Stephanie had fabricated the story; rather, it was offered to prove that the defendant did not commit the act of molestation on Stephanie. Therefore, Deletto does not support the argument that lay witnesses' opinion testimony that the defendant has previously exhibited normal sexual behavior is admissible.

In sum, both statutory and case law support the trial court's ruling that the testimony of lay persons regarding a defendant's sexual deviance is inadmissible because it is within the realm of expert testimony.

- B. Even Assuming That Lay Witnesses Are Qualified To Testify On The Subject Of Sexual Behavior, Testimony Regarding The Defendant's Past Sexual Conduct Was Properly Excluded Because Character Evidence In The Form Of Specific Instances Of Conduct Is Inadmissible If Offered To Prove The Defendant Did Not Commit The Crime Charged.

Even assuming the defendant's lay witnesses were qualified to testify on the subject of the defendant's prior "normal sexual behavior," the trial court properly excluded this evidence and properly limited the witnesses' testimony to opinion and reputation evidence of the defendant's character for honesty and veracity, based on provisions of the California Evidence Code governing admission of character evidence. Section 1101(a) provides that:

except as provided...in [section] 1102...evidence of a person's character or trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

Cal. Evid. Code § 1101(a) (West Supp. 1990). Section 1102(a) in turn provides that:

evidence of the defendant's character or traits of his character in the form of an **opinion or evidence of his reputation** is not made inadmissible by section 1101 if such evidence is:

(a) offered by the defendant to prove his conduct in conformity with such character or trait of his character.

Cal. Evid. Code § 1102(a) (West 1965) (Emphasis added). Thus, the statutes plainly exclude the admission of evidence of a defendant's character or traits of his character in the form of **specific instances of conduct**, when offered to prove that the defendant acted in conformance with that character or trait on a particular occasion. See, also, People v. Wagner, 13 Cal. 3d 612, 619 (1975) (evidence of specific acts of the accused are, as a general rule, inadmissible to prove his disposition to commit such acts).

In this case, the defense proffered the testimony of two former girlfriends that, during the times they had observed the defendant, he had exhibited "normal sexual behavior" by not acting in a lewd or deviant manner and by not molesting their daughters. Because this testimony related to specific instances of conduct which was offered to prove: (1) that the defendant possessed the character of person who was not a sexual deviant or a child molester; and (2) that he had acted in conformity with this character on the occasion in question, this testimony was plainly inadmissible under Evidence Code sections 1101 and 1102.

Furthermore, none of the exceptions to the bar against admissibility of evidence of a defendant's character in the form of specific instances of conduct apply here. First, Evidence Code section 1101(b) provides that evidence that a person committed an act,

if offered to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident) other than that person's disposition to commit the act, is admissible. Cal. Evid. Code § 1101(b) (West 1965). However, the evidence here was not offered to prove any fact other than the defendant's disposition not to commit an act of child molestation. Facts such as the defendant's motive, intent, or identity were not at issue in this case. The only material issue was whether the defendant had in fact committed the act in question. Second, evidence of specific instances of conduct is also admissible to rebut evidence introduced by the prosecution that impeaches the defendant's character. Law Revision Commission Comment to Evid. Code § 1102. Here, the prosecutor did not attempt to impeach the defendant's character, but only introduced evidence contrary to the defendant's testimony. It is well established that the introduction of evidence that simply contradicts the defendant's testimony does not impeach his character. People v. Taylor, 180 Cal. App. 3d 622, 630 (1986). Thus, this exception to the bar against admissibility of specific instances of conduct is also inapplicable. A final exception to the inadmissibility of specific acts evidence applies when a defendant's character is an ultimate fact in dispute, i.e., when character is a material element of the crime charged, such as in libel or child custody cases. Law Revision Commission Comment to Evid. Code § 1100; In Re Dorothy L., 162 Cal. App. 3d 1154, 1159 (1984). However, in this case, the defendant's character was not at issue because it did not bear on whether he was telling the truth about not committing the crime charged. Only the defendant's credibility was in dispute.

The defendant argues, however, that the proffered character

evidence, rather than being offered to prove that he acted in conformance with a certain character trait on a specified occasion, was being offered in support of his credibility. This court has recently held that evidence of specific instances of conduct, when offered in support of a defendant's credibility, is admissible in a criminal trial as a result of the enactment of section 28(d) of article I of the California Constitution (the "Right to Truth in Evidence" provision of Proposition 8). People v. Harris, 47 Cal. 3d 1047, 1081 (1989). Section 28(d) effected a "pro tanto repeal" of California Evidence Code sections 786 and 787, which formerly provided that evidence of specific instances of conduct offered to attack or support the credibility of a witness was inadmissible. Although such evidence is now admissible, it nevertheless must be relevant to a witness' credibility. See, Cal. Evid. Code §§ 210 and 350 (West 1965). The test of relevancy in the context of credibility is whether the evidence will aid the trier of fact in appraising the witness' credibility and in assessing the probative value of the witness' testimony. People v. Sergill, 138 Cal. App. 3d 34, 40 (1982). Thus, if a reasonable trier of fact could believe that the evidence would be sufficient to have a reasonable tendency to prove or disprove the witness' credibility, then the evidence is relevant and should be admitted. Id.

Here, the evidence of specific instances of conduct was not relevant to the issue of the defendant's credibility, and was therefore properly excluded. No reasonable trier of fact would have believed that evidence of the defendant past sexual behavior would have any bearing on the issue of whether he was telling the truth about not committing the crime charged. Evidence that a person acted



in a certain way in the past, with the exception of evidence tending to show that he told the truth or otherwise acted with integrity, does not have any tendency in reason to prove or disprove that he is a credible person.

The trial court therefore did not abuse its discretion in restricting the character witnesses' testimony to opinion and reputation evidence, regardless of whether the evidence was offered to show that the defendant did not commit the act in question, or whether it was offered in support of his credibility.

C. The Testimony Of The Defendant's Past Sexual Behavior Was Also Properly Excluded Because Such Testimony Was Irrelevant, And Even If Slightly Relevant, The Probative Value Of The Testimony Was Outweighed By Its Prejudicial Effect.

The trial court also properly excluded testimony regarding the defendant's prior sexual conduct, and properly restricted the character witnesses' testimony to opinion and reputation evidence as to the defendant's character for honesty and veracity, based on provisions of the California Evidence Code prohibiting the admission of irrelevant and prejudicial evidence. First, because evidence of specific instances of the defendant's past sexual conduct and of character traits other than honesty and veracity did not have a reasonable tendency to prove or disprove the material issue whether the defendant was telling the truth about not committing the crime charged, the evidence was properly excluded as irrelevant under California Evidence Code section 350. Secondly, even assuming arguendo that the excluded testimony possessed some minor probative value as to whether the defendant committed the crime charged, the probative value of the offered evidence was substantially outweighed by the testimony's potential prejudicial effect on the prosecution

under California Evidence Code section 352.

1. Testimony regarding specific instances of defendant's past sexual conduct does not meet the fundamental relevancy requirements for admissibility.

California Evidence Code section 210 defines "relevant evidence" as evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. Cal. Evid. Code § 210 (West 1965). Relevant evidence is also defined as evidence that tends logically, naturally, or by reasonable inference to establish a material fact. People v. Yu, 143 Cal. App. 3d 358, 376 (1983). California Evidence Code section 350 provides that "no evidence is admissible except relevant evidence." Cal. Evid. Code § 350 (West 1965). This rule excludes evidence of all collateral facts or facts that are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute. Firlotte v. Jessee, 76 Cal. App. 2d 207, 210 (1946). For example, evidence of past conduct that occurs an unreasonable period before the trial may be properly excluded as remote and irrelevant. Hicks v. Hicks, 249 Cal. App. 2d 964, 968 (1967). Furthermore, in order for reputation and opinion evidence to be admissible under Evidence Code section 1102, it must be relevant to the **charged offense**. People v. Qui Mei Lee, 48 Cal. App. 3d 516, 526 (1975). Wide discretion is left to the trial judge in determining whether evidence is admissible, Yu, 143 Cal. App. 3d at 376, although a trial judge must give a defendant the benefit of any reasonable doubt when passing on the admissibility of evidence. People v. Wright, 39 Cal. 3d 576, 584 (1985). An evidentiary ruling of the trial court must not be overturned unless manifest abuse of discretion is shown. Kelly, 17 Cal. 3d at 39.

Here, the trial court did not abuse its discretion in limiting the proffered testimony of the defense's character witnesses to opinion and reputation evidence because evidence of the defendant's specific past acts does not satisfy the test for relevancy. The same conclusion obtains even upon giving the defendant the benefit of any reasonable doubt as to the evidence's admissibility. Testimony that the defendant exhibited "normal sexual behavior" and did not molest the daughters of other women the defendant dated briefly in the past does not have any tendency in reason to prove that the defendant did not commit the alleged molestation on or about June 9, 1985. The defendant may not have molested innumerable other children and yet still committed the crime charged. Furthermore, the one former girlfriend of the defendant who actually testified stated that she had met the defendant approximately one full year prior to the alleged molestation, and had only dated him about four or five months. This fact alone significantly diminishes the probative value of her specific acts testimony, since she had not observed the defendant recently enough or known him long enough to make an accurate assessment of his conduct. When this fact is considered in conjunction with the fact that the specific acts testimony was collateral to the material issue whether the defendant committed the crime charged, it is clear that this evidence possessed no probative value and was irrelevant. Therefore, the trial court did not abuse its discretion in limiting the character witnesses' testimony to opinion and reputation evidence.

The trial court also did not abuse its discretion in restricting the character witness' testimony to the specific character traits of honesty and veracity, and in excluding the offered testimony regarding

the defendant's character for normal sexual behavior. The only material issue of the case was whether the defendant was telling the truth about not committing the alleged offense; his character for normal sexual behavior was not at issue. Therefore, evidence of character traits other than honesty and veracity was irrelevant and inadmissible.

2. Even assuming that the character witnesses' specific acts testimony possessed some probative value, its probative value was outweighed by its potential prejudicial effect.

California Evidence Code section 352 permits a trial court to exclude evidence if its probative value is substantially outweighed by the probability that its admission will either: (1) necessitate undue consumption of time; or (2) create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. Cal. Evid. Code § 352 (West 1965). As with other evidentiary rulings, wide discretion is afforded the trial judge in determining whether to exclude evidence under this section. People v. Sassounian, 182 Cal. App. 3d 361, 402 (1986). Under section 352, the prosecution as well as the defense is afforded protection from the use of prejudicial evidence with little probative value. Wright, 39 Cal. 3d at 585. However, to protect the defendant's constitutional due process rights, the alleged prejudice to the prosecution cannot be based on mere speculation or conjecture, and evidence that is relevant to the prime theory of the defense cannot be excluded simply because the trial would be simpler without it. Id. Nevertheless, this does not imply that the defendant has a constitutional right to present all relevant evidence in his favor, no matter how limited in probative value; rather, the trial court always retains its discretion to exclude



evidence with only minor probative value pursuant to Evidence Code section 352. People v. Reeder, 82 Cal. App. 3d 543, 553 (1978).

This court's holding in Wright, a case involving an appeal from a first degree murder conviction, is illustrative of these principles. Wright, 39 Cal. 3d 576. In Wright, the defendant offered evidence, in support of his defense of self-defense, that the victim had been under the influence of heroin during an arrest which had occurred two years prior to the murder. Id. at 582. This court upheld the trial court's exclusion of the evidence on the grounds that its minor probative value, due to its remote and collateral nature, was outweighed by its potential prejudicial effect on the prosecution's case. Wright, 39 Cal. 3d at 585. A trial court's exclusion of a defendant's character evidence was similarly upheld on the basis of a section 352 objection in People v. Covino, 100 Cal. App. 3d 660, 666 (1980). In Covino, an assault and battery case, the trial court excluded evidence of the victim's aggressive sexual behavior with men other than the defendant on the grounds that its slight probative value was outweighed by the possibility that such evidence would confuse the issues and consume an undue amount of time. Id.

Here, even assuming arguendo that the specific acts evidence offered by the defendant possessed some slight probative value regarding the issue whether he in fact committed the crime charged, the evidence was nevertheless properly excluded by the trial judge on the basis that the evidence's minor probative value was substantially outweighed by its potential prejudicial effect. If the character witnesses had been allowed to testify as to each instance they observed the defendant did not act in a lewd or lustful manner, then pursuant to Evidence Code section 1102, the prosecution would have

been permitted to rebut this evidence through its own character witnesses. See, Law Revision Commission Comment to section 1102. The defendant in turn would have been able to respond to this testimony, and so on. This would have effectively created a "mini-trial" resulting in undue time consumption, confusion of the issues, and misleading of the jury. This is precisely the reason why evidence of specific instances of conduct is excluded under Evidence Code section 1102. See, Law Revision Commission Comment to section 1102. The fact that the California Legislature deemed the potential prejudicial effect of specific acts evidence significant enough to warrant passage of a rule of evidence barring its admission is sufficient proof that the potential prejudice to the prosecution in this case was not based on mere conjecture. Further, the testimony excluded by the trial court was not essential to the defendant's defense and did not impair the defendant's due process rights. The trial court did not bar the testimony of the defendant's character witnesses altogether, but merely restricted their testimony to opinion and reputation evidence regarding the defendant's character for honesty and veracity. Since these were the only character traits relevant to the material issue of whether the defendant committed the crime charged, the trial court's ruling did not constitute an abuse of discretion and should be upheld.

III. ASSUMING THE TRIAL COURT DID ERR IN ADMITTING OFFICER MILLER'S EXPERT TESTIMONY AND IN RESTRICTING THE TESTIMONY OF DEFENDANT'S CHARACTER WITNESSES, THESE ERRORS WERE NOT REVERSIBLE PER SE, NOR DID THEY RESULT IN A MISCARRIAGE OF JUSTICE REQUIRING REVERSAL.

Assuming the trial court did commit an error by: (1) admitting the expert testimony of Officer Miller; and/or (2) excluding evidence of prior specific instances of the defendant's conduct and restricting the character witnesses' testimony to the character traits of honesty

and veracity, this error does not require reversal of the jury's verdict, under either the "reversible per se" or the harmless error standards.

A. The Alleged Errors Were Not Prejudicial Per Se.

A trial court's error is "prejudicial per se" when the error was egregious enough to render the trial "fundamentally unfair." People v. Hedgecock, 51 Cal. 3d 395, 410 (1990). Errors have been found to be "prejudicial per se" in cases where the defendant's confession was wrongfully introduced, People v. McClary, 20 Cal. 3d 218, 230 (1977), the defendant was denied the right to a jury trial, Selby Constructors v. McCarthy, 91 Cal. App. 3d 517, 527 (1979), the case was adjudicated by a biased judge, People v. Boyer, 48 Cal. 3d 247, 279-80 (1989), or the defendant's fundamental constitutional due process rights were violated in some other fashion.

This case involved no such egregious violation of a defendant's constitutional rights. Neither the admission of Officer Miller's testimony nor the exclusion of the character witnesses' testimony resulted in an error egregious enough to be reversible per se. The defendant was not denied a jury trial. There was no evidence that he was tried before a biased judge. The defendant was permitted to call witnesses in his defense and to cross-examine the prosecution's witnesses. Minor evidentiary issues of the kind involved in the case at bar simply do not rise to the level of constitutional error required to render a trial fundamentally unfair. Therefore, the trial court's ruling was not reversible per se, assuming it was error.

B. The Alleged Errors Were Harmless And Did Not Result In A Miscarriage Of Justice Requiring Reversal Under The Test Of People v. Watson.

The other standard used in California to determine whether a

trial court abused its discretion to an extent that requires reversal of the jury's verdict is the "harmless error" standard enunciated in People v. Watson, 46 Cal. 2d 818, 836 (1956). If the defendant had counsel and was tried by an impartial adjudicator, as the case here, there is a strong presumption that any errors that may have occurred are subject to the harmless error analysis. Rose v. Clark, 478 U.S. 570, 579 (1986). An error is deemed to be harmless unless a "miscarriage of justice" has occurred. Watson, 46 Cal. 2d at 836. A miscarriage of justice should be declared only when the court, after an examination of all the evidence, is of the opinion that it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. Id. For example, in People v. Deletto, 147 Cal. App. 3d 458 (1983), another case involving lewd and lascivious acts on a minor, the court held that although the trial court erred in permitting the minor's foster mother to testify as to the minor's aberrant behavior, the error was harmless because this testimony was irrelevant to the issue of the minor's sexual conduct, and because there was other evidence in support of the jury's verdict. Id. at 480. Therefore, the court held that it was not reasonably probable that a result more favorable to the defendant would have been reached absent the error. Id.

In this case, assuming the trial court erred in admitting Officer Miller's testimony and in excluding the specific acts testimony of the defendant's character witnesses, this error was harmless. First, it is not reasonably probable that the exclusion of Officer Miller's testimony would have resulted in a verdict for the defendant. If this court accepts the defendant's argument that the officer's testimony was erroneously admitted because the officer was not qualified to



testify as an expert and because his testimony was irrelevant, it would be inconsistent for it to simultaneously hold that the jury gave any weight to this irrelevant testimony in their deliberations. Second, it is not reasonably probable that the admission of evidence of the defendant's prior conduct would have caused the jury to find for the defendant, because this evidence was unrelated to the material issue whether the defendant committed the crime charged. In addition, the defendant was still permitted to present other evidence in support of his defense, in the form of opinion and reputation evidence of his character for honesty and veracity. Finally, there was other evidence that corroborated the complaining witness' testimony and supported the jury's verdict, such as Ms. Manley's testimony. Thus, it is not reasonably probable that the jury would have reached a different conclusion even if the defendant's proffered character evidence had been admitted. Therefore, assuming the trial court's rulings were in error, these errors did not result in a miscarriage of justice.

#### CONCLUSION

In sum, the trial court did not err in the admission of the expert testimony of Officer Miller that: (a) a parent's delay in reporting his or her child's statement that the child has been molested by a person the parent has been dating is not uncommon; and (b) there is no child molester "profile" or stereotype. The trial court also did not err in excluding the testimony of the defendant's previous girlfriends that he was not a sexual deviant, or in restricting their testimony to opinion and reputation evidence regarding the defendant's character for honesty and veracity. Finally, assuming the trial court did err in the admission and/or exclusion of evidence, this error did not rise to the level of

reversible error, under either the "reversible per se" or the Watson harmless error standard. Therefore, the People respectfully request that the trial court's rulings and the jury's verdict not be disturbed.

Dated: October 23, 1990